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Report Pursuant to LD 1117 'Resolve, to Require the Commissioner of Labor to Convene a Stakeholder Group to Determine the Most Appropriate Amount of Time an Employer May Employ an Employee without Being Subject to Unemployment Compensation Requirements'

Maine Department of Labor

Maine Bureau of Unemployment Compensation

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Recommended Citation

Maine Department of Labor; Maine Bureau of Unemployment Compensation; and Boyett, Laura, "Report Pursuant to LD 1117 'Resolve, to Require the Commissioner of Labor to Convene a Stakeholder Group to Determine the Most Appropriate Amount of Time an Employer May Employ an Employee without Being Subject to Unemployment Compensation Requirements'" (2012). *Unemployment Compensation Documents*. 6.
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**Maine Department of Labor
Bureau of Unemployment Compensation**

**LD 1117 'Resolve, To Require the Commissioner of Labor to Convene
a Stakeholder Group to Determine the Most Appropriate Amount of
Time an Employer May Employ an Employee without Being Subject to
Unemployment Compensation Requirements'**

**Report to the
Joint Standing Committee on
Labor, Commerce, Research and Economic Development**

January 2012

LD 1117 RESOLVE, To Require the Commissioner of Labor to Convene a Stakeholder Group to Determine the Most Appropriate Amount of Time an Employer May Employ an Employee without Being Subject to Unemployment Compensation Requirements

Sec. 1 Stakeholder group; report. Resolved: That the Commissioner of Labor or the commissioner's designee shall convene a stakeholder group to determine the most appropriate amount of time an employer may employ an employee without the employer's being subject to unemployment compensation requirements. The commissioner or the commissioner's designee shall invite the participation of representatives from the Maine Merchants Association, the Maine State Chamber of Commerce, the National Federation of Independent Businesses and the Maine Tourism Association. The commissioner or the commissioner's designee shall submit a report with the stakeholder group's recommendations to the Joint Standing Committee on Labor, Commerce, Research and Economic Development by January 15, 2012. The joint standing committee is authorized to introduce a bill related to the report to the Second Regular Session of the 125th Legislature.

Stakeholder Group

Labor Commissioner's designee - Laura Boyett, Director, Unemployment Compensation Bureau

Stakeholders:

Maine Merchants Association – Curtis Picard, Executive Director

Debra Hart, Director of Public Policy

Maine Chamber of Commerce – Peter Gore, Vice President of Governmental Affairs

National Association of Independent Businesses – David Clough, Director, Maine Chapter

Maine Tourism Association – Carolyn Manson, Public Affairs Manager

Application of Current Statute

Current Statute:

- The current, 5-week benefit charging statute is found under Title 26, Chapter 13 Section 1221 3(C) which states that "the experience rating record of the most recent subject employer shall not be charged with benefits paid to a claimant whose work record with such employer totaled 5 consecutive weeks or less of total or partial employment, but in such case the most recent subject employer with whom the claimant's work record exceeded 5 consecutive weeks of total or partial employment shall be charged, if such employer would have otherwise been chargeable had not subsequent employment intervened."
- The five-week charging statute does not impact potential benefit eligibility for claimants – it only addresses where the experience charges for any benefits collected as a result of a job separation where employment was less than 5 weeks are assigned.
- Additionally, the five-week charging statute is **not** related to seasonality as defined for unemployment purposes (as there is often confusion about this, Maine's seasonality provision is outlined later in this report). Moreover, the seasonality laws do not protect or prevent a seasonal employer from getting charged for non-seasonal benefits in a 5-week statutory situation. There is nothing in Maine's seasonality or 5-week charging statutes that prevents a seasonal employer from being charged for benefits in a situation where a former employee went to work for another employer who let the worker go prior to having worked 5 weeks. This is referenced under Chapter 6 of the Unemployment Insurance Commission Rules (Chapter 6, 3(C)).

Legislative History:

- Current statute was adopted in Maine in 1949 by Public Law, Chapter 203.
- 1947 to 1949: the period of time an employer could employ someone without incurring unemployment liability was 3 weeks. (P.L. Chapter 375)
- 1945 to 1947: All benefits were charged to the claimant's 'most recent' subject employer.
- Prior to 1945: unemployment benefits were charged to the experience rating record of the individual's employers in the inverse chronological order in which he or she was employed by them.

Recent Legislative Actions:

- In the first regular session of the 123rd Maine Legislature, LD 105 was submitted to increase this period from 5 weeks to 10 weeks. This effort failed.
- Two legislative proposals (LD 304 and LD 1117) were considered in the first session of the 125th Legislature. LD 304 sought to increase the number of weeks in which no unemployment liability was incurred from 5 weeks to 10 weeks. LD 1117 sought to increase this period from 5 weeks to 8 weeks. LD 304 was voted "Ought Not to Pass." LD 1117 was amended and converted to a Study Resolve for which this is the report.

Arguments in support of increasing the 'no unemployment charge' period:

- Temporary Staff Augmentation: Certain industries experience a 'seasonal' need to temporarily increase their workforce during planned upon periods of higher workloads. As an example, the retail industry needs to staff up to cover the increased sales demand of the Christmas holiday shopping period. Such businesses typically have a need to hire additional staff for longer than 5 weeks but believe that they are limited in doing so because of the potential impact on their unemployment contribution rates when these workers are let go. These businesses argue that they could increase the number of temporary jobs available to unemployed workers if not restricted by the impact of incurring unemployment benefit charges.
- New Hire Probation Period: Additionally, employers have argued that increasing the 5-week period would provide a better 'probationary' period in which to evaluate whether a new employee will be a good match to the business before they begin to incur unemployment liability if the employment arrangement does not work out.
- Harvest Period: similar to retail, certain agricultural businesses that hire additional workers to help harvest crops feel that 5-weeks is not adequate but do not want to incur unemployment benefit charges. Currently these employers do not hire enough workers, or encounter difficulties in trying to stagger workers across the harvest in a way to not work any of them over 5 weeks.

Arguments in opposition to increasing the 'no unemployment charge' period:

- Cost Shift: Arguments against the current statute and against increasing the period of time involved, focus on the fact that the current statute results in a 'cost shift' of the resulting benefit experience to other employers - either directly to a prior employer based on an earlier job separation or across all employers in a socialized manner. Businesses without these needs believe that they should not be penalized by having their experience rates impacted for job separations to which they were not a party.
- Issue of Fairness: Those arguing that the charge shift to prior employers is unfair argue that the fluctuating workforce needs of certain industries are unique characteristics of those industries and therefore the additional costs incurred should be considered customary

operating expenditures. To expect other businesses without this type of seasonal need to cover the customary costs of others is inherently inequitable and that this would favor some industries over others.

Similar Benefit Charging Practices of Other States:

- The criteria on which benefit charges are relieved in states that waive the most recent employer of benefit charges vary. According to the "Comparison of State Unemployment Insurance Laws 2011," there are 6 states that do this:
 - Employed less than 10 weeks (Kentucky)
 - Employed less than 5 weeks (Maine)
 - Employed less than 4 consecutive weeks (New Hampshire)
 - Employed for less than 30 days or 240 hours (Virginia)
 - Employed less than 30 days (Illinois)
 - Employed and earned less than 8 times their weekly unemployment benefit amount. (South Carolina)

Seasonality: I am including some information here on Maine Seasonality Laws as the term "seasonal" comes up a lot in the discussion around the '5-week' rule and sometimes results in confusion about the difference between the two laws.

- Seasonality laws are state set laws, not federal, so they can be changed through the Maine legislature. Only four states (Arkansas, Colorado, Maine and North Carolina) have seasonality laws or regulations.
- Under Maine seasonality law (Title 26, Chapter 13, Section 1251), a business can be considered seasonal if it is customary for the business due to its seasonal nature to operate only during a regularly recurring period or periods of less than 26 weeks in a calendar year.
- The law identifies specific businesses that if they customarily operate less than 26 weeks, they are automatically designated as 'seasonal'. If a business that does not fall under the ones already designated as seasonal wants to be considered seasonal, the Unemployment Insurance Commission must determine whether or not to designate the industry as such. The Commission can investigate whether an industry should be seasonal on its own or in response to a petition by at least 5 employers who claim to be a member of an industry they believe should be designated seasonal. The process the Commission follows for considering whether to designate an industry as seasonal is described in Chapter 6 of the Rules Governing the Administration of the Employment Security Laws (these can be viewed online by accessing the Dept of Labor website).
- Once approved as a seasonal business for unemployment purposes, the employees a seasonal business hires for their "season" are only eligible to collect unemployment benefits based on that seasonal work if they are laid off prior to the end of the business' established season. If a layoff occurs during the seasonal period, the benefits paid out are chargeable against the seasonal business. If a person collects benefits based on non-seasonally earned wages, the seasonal business is not charged - the separating non-seasonal business would be **except** where the seasonal employer is the most recent employer in a 5-week charging situation.

Stakeholder Group Work

Discussion & Options Considered:

As outlined in the Resolve, the stakeholder group was made up of at least one member from the Maine Chamber of Commerce, Maine Merchants Association, Maine Tourism Association and the National Federation of Independent Businesses. Additionally, Representative Kenneth Fredette, who sponsored the original LD 1117 bill proposal, participated in the group meeting and email discussions as an interested party. The Stakeholder group met in person once on October 14, 2011 and then communicated through email. The discussion at the first meeting revolved around current Maine statute, the statutes of the other 7 states that have similar laws, and the positions of the stakeholders with regard to this matter. Agreement among the stakeholders as to the appropriate number of weeks for which an employer could employ an individual without incurring unemployment coverage liability was **not** achieved.

A proposal was made at the in-person meeting to consider Virginia's statute. Virginia's statute reads:

"The employing unit from whom such individual was separated, resulting in the current period of unemployment, shall be the most recent employing unit for whom such individual has performed services for remuneration (i) during 30 days, whether or not such days are consecutive, or (ii) during 240 hours. If such individual's unemployment is caused by separation from an employer, such individual's "benefit charges" for such period of unemployment shall be deemed the responsibility of the last employer for (i) 30 days or (ii) 240 hours prior to such period of unemployment."

In the Virginia model, there is no 'socialization' of the cost across all employers, the most recent employer for whom the employee worked at least 30 days or 240 hours is assigned the benefit charges. When examining this model, certain administrative challenges were identified; specifically the fact that Maine employers do not currently track and report hours worked by their employees to the Department of Labor for unemployment purposes. If Maine were to adopt Virginia's model, employers would have to start tracking the number of hours worked and report them to the department so that in the event a worker separated from employment prior to working 30 days or 240 hours, the department would be able to determine which prior employer any resulting unemployment benefits would be charged against. Additionally, the department's unemployment system applications do not require the need to capture and retain this information so adopting this model would require programming changes (possibly complex).

Given the increased administrative burden for both employers and the agency, a second recommendation was offered within the group to increase the current statute by 1 week – from 5 to 6 weeks. However, in recognition of the concern for the potential impact resulting from the cost shifting of benefit charges to prior employers, this recommendation included a sunset provision in order to better assess the impact of this change. Some of the stakeholders felt that if this recommendation was supported by the group, the sunset provision would need to provide at least a one year period of operation to accurately assess the impact.

Stakeholder Positions on Suggested Recommendations:

Maine Chamber of Commerce: The Virginia option or at least the idea of using a 'day/hour' cap was appealing but might not be feasible given the additional administrative burden it would place on both employers and on the department. Mr. Gore also stated that he would find it difficult to support the additional week extension unless any sunset language would require an

affirmative vote of the legislature by a date certain in order to extend the change past two years. He recognizes that adding a week might help some employers but also expressed concern about the cost shift to other employers that would happen as a result. Therefore, if this option were considered, it would need to contain a data gathering element and a recommendations section that includes the ability to submit legislation on this issue. However, Mr. Gore did conclude that with a sunset provision as described, the Chamber would support increasing the current 5-weeks to 6-weeks.

Maine Merchants Association & Maine Tourism Association: Both of these Associations were supportive of both proposals. Maine Merchants gave preference to the simple option increase to 6 weeks due to the administrative issues associated with the Virginia model.

Representative Fredette: As an interested party and sponsor of LD 1117, Representative Fredette also gave his support for both options.

National Federation of Independent Businesses: The NFIB was unable to support either recommendation feeling that changing the benefit charging law to benefit one employer segment or industry sector over another raises serious fairness issues. The options were presented and discussed with the NFIB membership but support for changing the law among the members was much divided. The feeling of the NFIB is that fair and equitable charging should not be designed to favor any particular employer or industry over another. Mr. Clough stated that while the intentions of sponsors and proponents are understandable, lawmakers should avoid tipping the benefit-cost scales in favor of particular business interests.

Conclusion:

Although the stakeholders came together in a sincere effort to reach agreement as to the appropriate period of time for which an employee could work for an employer without incurring unemployment coverage liability, a full consensus was not reached. The option that received the most support among the stakeholders was increasing the 5-week period to 6-weeks with a sunset provision. Three of the stakeholder groups were able to support this option. However, the NFIB represents a significant segment of Maine's employer constituency and they remain strongly opposed to this change.

Stakeholder consensus was not reached and a significant community of businesses continues to oppose any expansion of this statute. Therefore, the Department of Labor finds it difficult to recommend that the Labor, Commerce, Research & Economic Development Committee take action to expand the current statute.

